No. 78-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX.

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PETITION FOR CERTIORARI FILED JUNE 30, 1979
CERTIORARI GRANTED MARCH 17, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
4– 9–75	Complaint filed as Case No. 75 C 1129, U. S. District Court, Northern District of Illinois, Eastern Division; 29 U. S. C. § 256(a) consent filed for Stanley E. Coutu
6– 5–75	Defendant's Motion to Dismiss Complaint, filed
10– 8–75	Memorandum Opinion and Order of the District Court, Dismissing Count I of the Complaint, filed
11–10–75	Answer to Remaining Counts, filed
2– 6–76	Deposition of Coutu, filed
2–18–76	Deposition of Kennedy, filed
8– 4–76	Class Action Certification Order, filed
9– 9–76	Deposition of Orr, filed
1–13–77	Deposition of Carrigan, filed
1–13–77	Deposition of McCook, filed
1–31–77	Deposition of Peoples, filed
1–31–77	Deposition of Huson, filed
12–12–77	Deposition of Marofske, filed
2–18–77	Pre-trial Conference; briefing schedule set for Summary Judgment Motion to resolve legal issues
3–18–77	Motion for Summary Judgment, filed
11–29–77	Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment, filed

12–28–77	Notice of Appeal, filed
12– 6–78	Oral Argument before the Court of Appeals for the Seventh Circuit
4– 4–79	Decision of the Court of Appeals, filed
5– 3–79	Stay of Mandate issued
6– 1–79	Stay of Mandate, extended
6–30–79	Petition for Writ of Certiorari Docketed
11– 5–79	Solicitor General invited to file a brief expressing views of the United States
3–17–80	Petition for Writ of Certiorari, granted

STANLEY E. COUTU,

Plaintiff,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,

Defendant.

COMPLAINT

This is a class action for compensatory damages, and other appropriate relief, resulting from certain practices in payment of wages by defendants to members of plaintiff's class.

FIRST CAUSE OF ACTION

For A First Cause Of Action, Plaintiff And The Class Allege:

I

This action arises under one or more laws regulating Interstate Commerce, and jurisdiction of this action is predicated upon 28 United States Code, Sections 1331 and 1337, among others, and under the Davis-Bacon Act, Title 40 United States Code, Section 276a, as hereinafter more fully appears.

II

The named defendants are contractors in a contract to which the United States is a party. The said contract is for an amount in excess of $2,000.00, is sometimes known as Contract No. AT(49-8)-3000, and provides among other things for construction, alteration and/or repair of public buildings or public works of the United States at the facility known as the National Accelerator Laboratories, and requires or involves the employment of mechanics and/or laborers. The named defendants have the original or copies of the said contract.

III

The named defendants have failed to pay to members of plaintiff's class the minimum wages required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act (Title 40, United States Code, Section 276a *et seq.*), as is more fully described below.

IV

The defendants have, pursuant to the said contract, employed each of the plaintiffs in the performance of labor for the construction, alteration, and/or repair of public buildings and public works of the United States. Further, and notwithstanding the existence of determinations by the Secretary of Labor of prevailing wages for corresponding labor on projects of a character similar to the said contract work, the defendants have paid the plaintiffs wages and wage rates substantially lower than specified in such prevailing wage determinations. The total of the minimum wages which have been withheld from plaintiffs in the manner so specified, and the damage to plaintiffs thereby is in excess of Five Million Dollars ($5,000,000.00).

V

This action is brought on behalf of the named plaintiff, individually, and as a representative of all persons similarly situated. The class of plaintiffs consists of the following ascertainable members:

1. All members of the class are mechanics and/or laborers employed by defendants, pursuant to the said contract, for construction, alteration, and/or repair of public buildings or public works of the United States, and who have been illegally and wrongfully deprived of the minimum wages and wage rates required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act.

2. The names and addresses of all members of the class can be ascertained from the business records of the defendants.

3. Defendants' class consists of all named defendants paying or causing to be paid the herein described wrongful and illegal wages and wage rates to the plaintiff and members of plaintiff's class.

VI

A community of interest exists in the plaintiff class on whose behalf this action was instituted and against the defendant class against whom this action is prosecuted for the following reasons:

1. All members of the class are similarly situated as shown in Paragraph V above. The only significant difference between members is the amount which is owed to each, which amount can be determined either by simple mathematical calculations or from defendants' business records.

2. All members of the class have a virtually identical interest in having the court determine the legal questions of the validity of the defendants' wage payment practice.

The following policy considerations unite plaintiff and all members of the class, including the class of defendants:

1. The members of the class are too numerous to bring each and every member before the court as individual parties.

2. Proof of a common or single state of law will establish the right of each member to recover damages for the wrong inflicted upon them. Proof of a common state of facts will establish the amount which each member of the class is owed because of the wrong inflicted upon them.

3. Were a class action to be denied here, a multiplicity of suits dealing with an identical legal question would be required to give a remedy to the plaintiffs in the class

wronged by defendants' actions. A single adjudication will, on the other hand, be determinative of the interests of all members of the class and prevent inconsistent adjudications, which would establish incompatible standards of conduct for the defendants.

4. Individual actions by each member of plaintiff's class are not practical since the total dollar amount arising from such wrong perpetrated against each such member is frequently smaller than would permit the retaining of separate counsel and the prosecution of such claim.

5. Individual actions are further impractical since at this time few members of plaintiff's class are aware of the wrong done, and unless they are generally made aware of the wrong, few would seek redress.

6. The claims of the named plaintiffs are representative of the claims of all members of the class and the representative party will fairly and adequately protect the interest of the class.

7. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

SECOND CAUSE OF ACTION

For A Second Cause Of Action, Plaintiff And The Class Allege:

I

Plaintiff refers to and incorporates by reference, as though set forth in full herein, Paragraphs I, II, III, IV, V, VI and VII of the plaintiff's First Cause of Action.

II

The contract pursuant to which the plaintiffs have been so employed, itself provides for payment to members of the plaintiff class at the legal wage rate applicable to the work actually

performed. The defendants have failed to make such payments as required by the said contract and have breached their contractual obligations to the members of plaintiff class. By reason of such breach of contract, the defendants have deprived plaintiffs of substantial amounts, to plaintiffs' damage in excess of $5,000,000.00.

THIRD CAUSE OF ACTION

For A Third Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

On various dates which are reflected in defendants' business records, defendants made improper wage payments as alleged above, and defendants have failed to disclose to plaintiffs the nature and amount of the said underpayments or to account to plaintiffs for the amounts so withheld, and have represented that the wages and wage rates paid to the members of plaintiff class were valid and proper.

III

Defendants knew that the underpayments were wrongful and nevertheless have failed to disclose to plaintiff and the class the true nature and amount of the said underpayments, and have knowingly failed to account to the plaintiff class and have knowingly concealed said underpayments and falsely represented the facts concerning the impropriety of the wages and wage rates actually paid.

IV

By said practice and failure to disclose and representations, defendants intended to and did defraud the plaintiff class by unjustly depriving them of their proper wages and wage rates.

V

Plaintiff and the class were unaware of the wrong done them and in accepting wages tendered by defendants reasonably relied on the representations made by the defendants.

VI

In or about June, 1973, the named plaintiff discovered the fraud.

VII

As a result of the foregoing, defendants acted maliciously, oppressively, and were guilty of wanton disregard of the rights of plaintiff and the class, and by reason thereof, plaintiff and the class demand punitive damages in reasonable amount, for the purpose of making an example, and for the purpose of preventing further such actions on the part of defendants and their class. Plaintiff and the class believe that said reasonable amount would be measured by the sum of three times the amount of the underpayment, and believe said amount to be in excess of $15,000,000.00.

FOURTH CAUSE OF ACTION

For A Fourth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporated herein by reference all of the

allegations contested in paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, within this jurisdiction, defendants became indebted to plaintiff and the class for money had and received by defendants for the use and benefit of plaintiff and the class, in an amount equal to the amount of the wage underpayments alleged above.

III

That no part of said sum has been paid, although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum from the date said money was had and received for the use and benefit of defendants.

FIFTH CAUSE OF ACTION

For A Fifth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, defendants rendered to plaintiff and the class an account or accounts in writing, commonly known as wage statements, purporting to show the balances due from defendants to plaintiff and the class for labor performed pursuant to the said contract.

III

Plaintiff and the class, reasonably relying on said statements of account and believing said statements to be correct, received the amounts appearing on the said statement or statements.

IV

Subsequent to the making of said payments, plaintiff and the class discovered that said accounts were not correctly stated, but were in fact understated by the failure to include therein the proper wages and wage rates required to be paid them pursuant to the said contract and the law. Plaintiff and the class are informed and believe and therefore allege that the total underpayment to plaintiff and the class was in excess of $5,000,000.00.

V

Plaintiff and the class demanded of defendants that defendants pay and make restitution to plaintiff and the class for the amount of the said wage underpayments, but defendants have retained said amounts and have failed, neglected and refused to pay same to plaintiff and the class, and no part thereof has been paid.

SIXTH CAUSE OF ACTION

For A Sixth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, in this jurisdiction, defendants became indebted to plaintiff and the class in an open book account for money due in a sum which plaintiff and the class are informed is in excess of $5,000,000.00, unpaid to plaintiff and the class by defendants for labor performed pursuant to the said contract at the special instance and request of defendants, and which sum defendants are obligated to pay over to plaintiff and the class.

III

No part of said sum has been paid although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum, from the date said sum became due from defendants to plaintiff and the class.

SEVENTH CAUSE OF ACTION

For A Seventh Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, in this jurisdiction, defendants became indebted to plaintiff and the class on and pursuant to written contract or other evidences of indebtedness in writing, for money due in a sum which plaintiff and the class are informed is in excess of $5,000,000.00, unpaid to plaintiff and the class by defendants for labor performed pursuant to the said contract at

the special instance and request of defendants, and which sum defendants are obligated to pay over to plaintiff and the class.

III

No part of said sum has been paid although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum, from the date said sum became due from defendants to plaintiff and the class.

AD DAMNUM

Wherefore, plaintiff and the class request Orders and Judgments granting them relief as follows:

1. An accounting;
2. Damages in such amounts as conform to the proof;
3. Punitive damages;
4. Interest at the legal rate of interest per annum;
5. Reasonable attorneys' fees;
6. Cost and expenses of suit;
7. Injunctive relief;
8. Declaratory relief;
9. Such other relief, whether legal or equitable or otherwise, as is just.

ANSWER

Defendant, Universities Research Association, Inc., a not-for-profit incorporated consortium of Universities under contract with the United States to administer the Fermi National Accelerator Laboratory, by its attorneys Seyfarth, Shaw, Fairweather & Geraldson, answers the Complaint as follows:

FIRST DEFENSE

I. Answer To First Cause Of Action Alleged.

The first cause of action alleged in the Complaint was dismissed by order of this Court dated October 8, 1975, and therefore requires no answer.

II. Answer To Second Cause Of Action Alleged.

1. (a) Defendant denies each and every allegation set forth in Paragraph I of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(b) Defendant admits the allegations set forth in Paragraph II of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action (with the exception that the proper name of the referred to facility is Fermi National Accelerator Laboratory). Defendant states that the contract referred to therein also sets forth expressly schedules of compensation for employees of Defendant, and establishes procedures and controls whereby said schedules are funded by monies supplied directly by the United States for that purpose.

(c) Defendant denies that it has failed to pay wages pursuant to the schedules approved by the United States and set forth in said contract; Defendant admits that it has not paid wages to its employees pursuant to any schedules other than those set forth in the contract and approved by the United States; Defendant states

that the U. S. Secretary of Labor has made no wage determinations relevant to said contract, and that the United States has determined that 40 U. S. C. § 276(a) is not applicable to the referenced contract, insofar as Defendant's employees are concerned; and Defendant denies each and every other allegation set forth in Paragraph III of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(d) Defendant admits that it has not paid Plaintiff pursuant to alleged determinations and/or schedules set by the Secretary of Labor; Defendant states that it has not paid Plaintiff pursuant to such determination for the reason that no such determinations have been made relative to Plaintiff's work and for the further reason that the United States, which supplies the monies to pay Plaintiff, has determined and directed that Plaintiff be paid pursuant to schedules approved by the United States and set forth in the contract; and Defendant denies each and every other allegation set forth in Paragraph IV of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(e) Defendant admits that the names and addresses of its employees may be ascertained from its records; Defendant denies the existence of any "class" and denies each and every other allegation set forth in Paragraphs V, VI and VII of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

2. Defendant denies each and every allegation set forth in Paragraph II of the Second Cause of Action alleged.

III. Answer To Third Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Third Cause of Action alleged.

2. Defendant denies making any improper wage payments, or underpayments, denies that any wage payments made were

wrongful or falsely represented, denies that any fraud occurred in relation to wage payments or representations with respect thereto, and denies each and every other allegation set forth inclusive, in the Third Cause of Action alleged.

IV. Answer To Fourth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Fourth Cause of Action alleged.

2. Defendant denies any underpayment of wages and denies each and every other allegation set forth in the Fourth Cause of Action alleged.

3. Defendant states, in further answer to the Fourth Cause of Action alleged:

a) that it is a not-for-profit entity;

b) that all monies required for wage payments to persons employed by it are supplied directly by the United States;

c) that the United States supplies, for said wage payments, monies strictly limited in amount to that required by wage and benefit schedules previously approved by the United States;

d) that the United States regularly audits said payments to ensure conformity with said schedules;

e) that Defendant does not now receive and never has received for its own use, any monies from the United States computed with respect to, or otherwise related to, employee wage payments;

f) that any monies the United States does not supply for payment of wages in conformity to the aforesaid schedules, or for payment to Defendant in relation to Defendant's own expenses of administration (said ex-

penses of administration being expressly agreed to by the United States, regularly audited, and wholly unrelated to employee wage payments), or used for purchase of materials, supplies and subcontracts, approved by the United States, are retained by and for the use of the United States.

V. Answer To Fifth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Fifth Cause of Action alleged.

2. Defendant admits the allegations set forth in Paragraphs II and III of the Fifth Cause of Action alleged.

3. Defendant denies that any "wage statements of account" as alleged in Paragraphs II, III and IV, were incorrect and therefore Defendant denies each and every allegation set forth in Paragraph V of the Fifth Cause of Action alleged.

4. Defendant denies that Plaintiff, or any member of the putative "class" received underpaid wages or demanded wages different from those received for work performed and Defendant therefore denies each and every allegation set forth in Paragraph V of the Fifth Cause of Action alleged.

VI. Answer To Sixth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Sixth Cause of Action alleged.

2. Defendant denies each and every allegation set forth in Paragraphs II and III of the Sixth Cause of Action alleged.

VII. Answer To Seventh Cause Of Action Alleged.

1. Defendant here incorporates by references its answers to the allegations set forth in Paragraph I of the Second Cause of

Action alleged, in answer to the allegations set forth in Paragraph I of the Seventh Cause of Action alleged.

2. Defendant denies each and every allegation set forth in Paragraphs II and III of the Seventh Cause of Action alleged.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to prosecute his claim pursuant to the provisions of 40 U. S. C. § 270a-d in the name of the United States, or under the provisions of 40 U. S. C. § 276a-2(b), those statutory remedies being the exclusive means to assert claims based upon 40 U. S. C. § 276(a), the substantive jurisdictional statute alleged in the Complaint. *University of Chicago and Argonne* v. *McDaniel*, ... U. S. ....., 44 LW 3181 (October 6, 1975).

THIRD DEFENSE

The Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to allege a contract to which Defendant is a party, which contains the provisions, or determinations, referred to in 40 U. S. C. § 276(a), and pursuant to which Plaintiff performed work.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of the facts that:

1. Plaintiff, at all times relevant, performed work pursuant to a contract between the United States and Defendant.

2. Said contract included provisions and schedules setting forth the rates of Plaintiff's compensation.

3. Said contract affirmatively recites that it is not subject to 40 U. S. C. § 276(a).

4. The United States has, at all times relevant:

a) supplied for payment to Plaintiff monies limited in amount to those required by the aforesaid compensation rate schedules approval by it and no more; and

b) audited, on a regular basis, records showing payments to Plaintiff to ensure conformity to the aforesaid schedules.

5. Defendant is entitled as a matter of law to rely upon its contract with the United States as being the sole expression of Defendant's obligation to compensate Plaintiff.

FIFTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to allege prior exhaustion of administrative remedies provided by the United States, through the contracting agency (Energy Research Development Administration), the U. S. Department of Labor, and the Comptroller General.

SIXTH DEFENSE

The Court lacks jurisdiction with respect to any matter raised in the Complaint and relating to events or transactions which occurred prior to April 9, 1973, or, as to any claimant who has not yet filed a consent as required by the Portal-to-Portal Act, 29 U. S. C. § 255, *et seq.* prior to two years preceding the date of such filing, under the applicable statute of limitations, § 6 of the Portal-to-Portal Act, 29 U. S. C. § 255.

SEVENTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted as to the purported "class" by reason of Plaintiff's failure to allege a valid class action under Rule 23 of the Federal Rules of Civil Procedure because:

a) the purported class is vague, indefinite and not reasonably identifiable; and

b) there are questions of law and fact bearing upon application of the Davis-Bacon Act to specific work assignments not common within the purported class.

EIGHTH DEFENSE

The Complaint should be dismissed on the ground that the Court lacks jurisdiction over the Complaint, and specifically its alleged Clauses of Action Second through Seventh, they being pendent to an alleged federal cause of action over which this Court lacks jurisdiction and which fails to state a claim upon which relief may be granted.

NINTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief can be granted because the matter in controversy does not exceed the sum or value of $10,000, exclusive of interests and costs; and does not arise under the Constitution or laws of the United States within the meaning of 28 U. S. C. §§ 1331, or 1337.

Wherefore, Defendant prays that the Complaint be dismissed, in its entirety, with prejudice, and with costs awarded to Defendant together with such other relief as the Court shall deem just.

MEMORANDUM OPINION AND ORDER

This is an action brought on behalf of the named plaintiff, Stanley Coutu, individually and as a representative of all persons similarly situated, seeking relief from certain practices in payment of wages by defendant to members of plaintiff's class. The complaint alleges seven causes of action, the first of which is based on the defendant's violation of the provisions of the Davis-Bacon Act, 40 U. S. C. § 276(a). The second cause of action alleges a breach of defendant's contractual obligations to plaintiff and the class under the Davis-Bacon Act contract set forth in the first cause of action and incorporated by reference in the remaining causes of action. Jurisdiction is predicated on 28 U. S. C. §§ 1331 and 1337, and under the Davis-Bacon Act, 40 U. S. C. § 276(a). The remaining causes of action are based on common law counts for fraud, restitution, and payment of indebtedness on account and contract. Jurisdiction is predicated on the allegation that each cause of action derives from a nucleus of operative fact common with the first cause of action, and is pendent thereto.

Leave to proceed on behalf of the class alleged has not been granted.

Defendant has moved for dismissal of plaintiff's complaint for any or all of eight reasons; the first three of which revolve around the same issue and will be treated collectively.

1. Defendant first moves for dismissal for the reason that this Court lacks jurisdiction over the subject matter of the complaint and/or the complaint fails to state a claim upon which relief can be granted, by reason of the plaintiff's failure to allege prior exhaustion of administrative procedures.

2. In the alternative, defendant urges the Court to defer, under the doctrine of Primary Jurisdiction, to administrative resolution of issues relating to application of the Davis-Bacon Act to work alleged under the sued-upon contract.

3. Furthermore, asserts defendant, the complaint fails to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint, by reason of the absence of any allegations of determinations by the Atomic Energy Commission (now U. S. Energy and Research Development Administration, hereinafter referred to as ERDA), or by the Secretary of Labor, specifying that compensation is to be paid for work performed under the contract different than the rates of compensation actually set forth therein and approved by the United States through ERDA, or that defendant has not in fact compensated employees in accord with the rates specified in the contract as approved by the United States through ERDA.

The defendant in its memorandum in support of its motion to dismiss has summarized the issues raised in paragraphs 1, 2 and 3 of its motion as follows: whether this Court has jurisdiction as a matter of law, or should as a matter of policy undertake to review, revoke or overrule, retroactively, determinations made by the agents of the United States government in the contract in question.

In his complaint, plaintiff has alleged a contract between the defendant and the United States for an amount in excess of $2,000 which provides for, among other things, construction, alteration and repair of public buildings or public works of the United States. Plaintiff has alleged that this contract requires or involves the employment of mechanics and laborers, and has further alleged that he and all the members of his class are mechanics and laborers employed by defendant pursuant to the said contract. The contract which plaintiff alleges exists between defendant and the United States is commonly referred to as Contract No. AT (49-8)-3000, a copy of which has been submitted to this Court by defendant.

In Paragraphs III and IV of what plaintiff labels his first cause of action, plaintiff alleges that the defendant has failed to pay to members of plaintiff's class the minimum wages required

to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.* This allegation contradicts the reasons which defendant cites for dismissal in the third paragraph of his motion. However, this allegation is not totally borne out by the alleged Contract No. AT (49-8)-3000.

Though the contract contains wage provisions, it does not contain the standard provisions found in a Davis-Bacon contract. 41 C. F. R. § 1-18.703-1. And as defendant has pointed out in the memorandum in support of its motion, the contract contains a clause in the labor provisions section which reads as follows:

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association (defendant herein), with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission (i.e., ERDA)....
>
> (Contract AT (49-8)-3000, p. 54)

The defendant relies on the above contract provision and the absence of standard Davis-Bacon Act provisions to support its position that the contract in question is not a Davis-Bacon Act contract. From this position, defendant reasons that plaintiff has no cause of action pursuant to the contract upon which plaintiff can possibly base a claim for relief or over which the Court can take jurisdiction.

The defendant in its memorandum has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and Appeals Board of the U. S. Department of Labor. 29 C. F. R. 5.11; 41 C. F. R.

7.10. Extrapolating on this position, defendant asserts that for this Court to take jurisdiction over plaintiff's alleged cause of action would be for the Court to subject the determinations of the Secretary of Labor to judicial review. This, the defendant asserts, the Court may not do, citing *United States* v. *Binghamton Construction Co., Inc.*, 347 U. S. 171, 74 S. Ct. 438 (1954) and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 60 S. Ct. 869 (1940).

The plaintiff, in response to defendant's motion to dismiss and memorandum in support thereof, relies exclusively on the recent Seventh Circuit decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975).

In *McDaniel*, the Court had before it a complaint containing allegations almost identical to those in the case at bar. The District Court concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in Federal Court, under the circumstances alleged in the complaint. On appeal, the Circuit Court agreed that § 276a-2(b) of the Davis-Bacon Act did not create a cause of action, cognizable in Federal Court, for one in plaintiff's position; the Court did conclude, however, that "[W]age-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in State Court actions or Federal Court actions where jurisdiction is properly based." *McDaniel*, 512 F. 2d 583, 586. The Court discussed the constitutional basis of the Davis-Bacon Act, finding the Act to be significantly based on the commerce clause. The Court therefore concluded that ". . . [P]laintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337." *McDaniel*, 512 F. 2d 583, 588.

Defendant has attempted to distinguish *McDaniel* on the grounds that in *McDaniel*, there was no question but that the

contract involved was a Davis-Bacon contract, while in the case at bar defendant asserts that the contract in question specifically excludes Davis-Bacon Act work. If true, plaintiff's reliance on *McDaniel* would surely be misplaced.

However, the purpose of a motion to dismiss is to test the legal sufficiency of the allegations of the complaint. 2A Moore's Federal Practice, 2265, 2266. The plaintiff herein has properly alleged a Davis-Bacon Act contract in his complaint, the only difficulty being that the specific contract which plaintiff alleges, Contract No. AT (49-8)-3000, does not bear out all of plaintiff's allegations. It does not, however, conclusively foreclose the possibility that plaintiff has stated a claim upon which relief may be granted.

Defendant relies on the contract clause taken from the labor provisions of the contract (quoted above) for its position that the contract does not contemplate the performance of Davis-Bacon work by defendant's employees. This clause, however, does not preclude the possibility of performance of Davis-Bacon Act work pursuant to the contract, albeit by someone other than defendant's employees. Furthermore, the Court is apprised of a correspondence between the defendant and the United States Atomic Energy Commission (ERDA) dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performance of Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon determinations by ERDA with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor.

The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA pursuant to the contract, and as to performance of Davis-Bacon Act work, properly or improperly assigned to plaintiff and the class by defendant, as alleged by plaintiff. This Court cannot make factual determinations on a motion to dismiss. *Schafly* v.

Volpe, 495 F. 2d 273 (7th Cir. 1974). Rather the complaint must be liberally construed with all factual allegations deemed to be true and with doubts resolved in favor of the pleader. *Parr* v. *Great Lakes Express Co.*, 484 F. 2d 767 (7th Cir. 1973). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 78 S. Ct. 99 (1957).

Thus, accepting plaintiff's allegations as true and construing all doubts in favor of plaintiff, this Court deems that plaintiff has alleged a cause of action in Count II on a Davis-Bacon contract which states a claim upon which relief may be granted and over which this Court has jurisdiction, based on the Seventh Circuit's finding in *McDaniel* that in such a cause of action jurisdiction may be properly predicated on 28 U. S. C. § 1337. Having asserted jurisdiction over this cause of action, the Court also has pendent jurisdiction to decide the state claims arising out of the same facts, which have been set forth in counts three through seven of the complaint. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 86 S. Ct. 1130 (1966). This Court does not thereby seek to review the determinations of the Secretary of Labor of the contracting agency; rather the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract.

Defendant's fourth reason for dismissal of plaintiff's complaint is based on the effect of the Portal-to-Portal Pay Act time limitations, 29 U. S. C. §§ 255, 256, which bar any action for unpaid minimum wages under the Davis-Bacon Act which is not commenced within two years after the accrual of the cause of action. Defendant asserts that under the provisions of 29 U. S. C. § 256, governing when an action is commenced for purposes of tolling the statute of limitations set forth in 29 U. S. C. § 255, the cause of action herein is determined to have been com-

menced as to the named plaintiff on April 9, 1975, when his complaint and his written consent to become a party plaintiff were filed. Therefore, as to the named plaintiff, Stanley Coutu, the statute of limitations under § 255 would bar any cause of action for minimum wages which accrued prior to April 9, 1973.

Some Federal Courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss, *see* Annot., 61 A. L. R. 2d 300, 327. However, in the Seventh Circuit a motion to dismiss raising the defense of the statute of limitations is proper where the bar of the statute can be seen from the face of the complaint. *Kincheloe* v. *Farmer*, 214 F. 2d 604 (7th Cir. 1954), *cert. denied*, 348 U. S. 920, 75 S. Ct. 306, 99 L. Ed. 721 (1955). In light of the Portal-to-Portal Act provisions with respect to actions under the Davis-Bacon Act, and in light of Rule 9A of the Federal Rules of Civil Procedure, the Court finds that defendant has properly raised the statute of limitations in his motion to dismiss.

The statutory language of § 255 clearly makes the statute of limitations applicable to plaintiff's Federal cause of action which predicates jurisdiction on 28 U. S. C. § 1337. The Court must apply state substantive law to state claims taken under pendent jurisdiction by a Federal Court. But while a statute of limitations is often considered to be a substantive matter, *J. M. Blythe* v. *Blalock*, 310 F. 2d 77 (5th Cir. 1962), the express purpose of 29 U. S. C. § 255 was to substitute a uniform Federal limitations period for the diverse periods provided under statutes of the several states. 29 U. S. C. § 251; *Hodgson* v. *Humphries*, 454 F. 2d 1279 (10th Cir. 1972). Thus the Court finds that the statute of limitations of § 255 is equally applicable to the state claims taken under pendent jurisdiction insofar as they arise by virtue of a Federal statute, and the Court's jurisdiction over them depends on their pendency to a cause of action under a statute with a two-year limitation.

There remains the question, however, whether the two-year statute of limitations is applicable on the three-year limitation

period for "willful" violations. 29 U. S. C. § 255(a). Though plaintiff has not specifically alleged "willfulness" in his complaint, with the exception of Count III, he has sufficiently pleaded his allegations to raise a factual issue as to whether defendant's actions were willful. The Court at this juncture cannot determine the issue of willfulness, but rather should defer a ruling on this issue until further evidence is presented at trial. *Bormann* v. *Long Island Press Publishing Co., Inc.*, 379 F. Supp. 951 (1974).

Defendant's fifth reason cited for dismissal of plaintiff's complaint is that it fails to state a claim upon which relief can be granted because of plaintiff's failure to allege a valid class under Rule 23 of the Federal Rules of Civil Procedure. The action is brought on behalf of the named plaintiff, individually, and as a representative of the class. Therefore, dismissal of the class would not dismiss the complaint. There has as yet been no determination as to whether the action may be maintained as a class action pursuant to Rule 23 of the Federal Rules. For these reasons, defendant's motion to dismiss for failure to allege a valid class action is unwarranted at this time.

Defendant's sixth ground for dismissal is based on plaintiff's failure to prosecute his claim pursuant to the provisions of the Miller Act, 40 U. S. C. § 270a-d, which requires defendant to procure a bond for payment of laborers and mechanics pursuant to contracts of the type in question. Defendant also asserts that plaintiff has failed to prosecute his claim under the provisions of the Davis-Bacon Act, 40 U. S. C. § 270a-2(b), which authorizes withholding of funds from the contractor for payment of unpaid laborers and mechanics employed pursuant to the contract.

The cause of action on defendant's contractual commitment under the Davis-Bacon contract is distinct from that on a Miller Act bond. *McDaniel,* 512 F. 2d 583 (7th Cir. 1975). The Miller Act cause of action arises when the contractor has furnished a bond, and when the funds withheld pursuant to § 276a-2(b), if any, are exhausted. In *McDaniel,* it was undisputed that

the contractor had not supplied a Miller Act bond, nor had the government withheld funds for payment of wage claims. In the case at bar, there has been no allegation or determination that a Miller Act bond exists or that funds were withheld from the contractor by the government. The Court need not determine whether exhaustion of these remedies is a condition precedent to a cause of action on defendant's contract commitments unless it be shown that such remedies do, in fact, exist. The withholding of funds by the government is not mandatory under 40 U. S. C. § 276a-2(b). And, as pointed out in *McDaniel,* the Miller Act bond can be waived in certain circumstances. 40 U. S. C. § 270(e). There has been no claim that such waiver here would have been unauthorized, and the complaint does not suggest that plaintiff's claim is based on defendant's failure to provide a Miller Act bond. Thus the complaint cannot be dismissed on the ground asserted by defendant in paragraph six of his motion.

Paragraphs seven and eight of defendant's motion charge that the Court cannot take jurisdiction over the claims of plaintiff's complaint for the reason that plaintiff fails to allege the requisite $10,000 damages for Federal jurisdiction and that the Court has no jurisdiction under § 1337. Defendant further asserts that, since the Court lacks jurisdiction over the Federal claims, it cannot assert pendent jurisdiction over the state claims.

These issues have already been disposed of by the Court. The Court recognizes defendant's claim of jurisdiction under 28 U. S. C. § 1337 for which no jurisdictional amount need be alleged. Having asserted Federal jurisdiction over plaintiff's Count II, the Court has pendent jurisdiction of the claims in Counts III through VII. *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966).

Therefore, defendant's motion to dismiss is granted as to Count I. The motion is denied as to Counts II through VII. The statute of limitations bars any cause of action of the named plaintiff which accrued prior to April 9, 1972. Those claims

under Counts II, IV, V, VI and VII of the named plaintiff accruing between April 9, 1972 and April 9, 1973 are not dismissed but are subject to determinations at trial concerning the willfulness of the violations. Count III is subject only to the three-year statute of limitations.

DATED: October 8, 1975

ENTER:

/s/ Frank McGarr

MEMORANDUM ORDER

This dispute arises out of a contract for the design, construction, and operation of the National Accelerator Laboratories, between defendant Universities Research Association, Inc. and the United States government acting through the Atomic Energy Commission and its successor, the Energy Research and Development Administration (hereinafter ERDA). Plaintiff Stanley Coutu filed this class action claiming that defendant failed to duly compensate plaintiff class for work it performed during the construction of the facility. The class has been certified and is described as follows:

> All "mechanics and/or laborers" employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America "for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States" who have been paid wages less than "the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State" in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*

Defendant is a not-for-profit consortium of universities formed for the purpose of facilitating scientific research and charged with the responsibility for design, procurement, and fabrication of the accelerator. Jurisdiction for Counts I and II of the complaint is invoked pursuant to 28 U. S. C. §§ 1331, 1337, and this court's pendent jurisdiction is invoked to entertain the remaining counts. This cause is before the court on defendant's motion for summary judgment.

Count I and II of plaintiff's complaint are the core federal claims contained in this suit. In Count I, plaintiff class purported to state a claim on the theory that defendant failed to

compensate plaintiff class in accordance with the prevailing wage determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, 40 U. S. C. § 279a, *et seq.*, whether or not the wage determinations were incorporated in the contract. This count was dismissed by the memorandum opinion and order filed by the Honorable Frank McGarr.

In Count II, plaintiff class alleges that the contract falls within the purview of the Davis-Bacon Act, and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." Judge McGarr denied defendant's previous motion to dismiss this count on the ground that plaintiff stated a claim on which relief could be granted and over which the court had jurisdiction in accordance with *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir.), *vacated and remanded on other grounds,* 423 U. S. 810 (1975). Judge McGarr held that the contract did not preclude performance of Davis-Bacon work by defendant's employees pursuant to proper Davis-Bacon determinations by the contracting agency, ERDA, and the necessary modifications of the contract. [See Memorandum Opinion an Order at p. 8] Accordingly, plaintiff class was given "leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determination with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract." [*Id.* at p. 10]

Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, claiming that there is no issue of material fact and defendant is entitled to judgment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is Contract No. EY-76-C-02-3000, as amended, formerly designated AT(49-8)-3000, and that "[n]o Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of

prevailing wages have ever been made a part of or incorporated in said Contract . . ." [Affidavit of John R. Frazier, ¶ 3]

Plaintiff class has filed a memorandum in opposition to defendant's motion. Plaintiff class as much concedes that the contract fails to include Davis-Bacon specifications [Plaintiff's memorandum at 1-3], but it argues that this amounts to a violation of the act which should not serve to shield defendant from plaintiffs' implied right of action found in *McDaniel* v. *University of Chicago,* 512 F. 2d 588 (7th Cir.), *vacated and remanded,* 423 U. S. 810 (1975), *reaff'd,* 548 F. 2d 689 (7th Cir. 1977). Plaintiff class argues that the following contract language contemplated the likelihood that Davis-Bacon Act work would be performed.

> ARTICLE XXXIII—LABOR PROVISIONS
>
> 1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

Based on its interpretation of the contract clause, plaintiff class argues that there is a material issue of fact with regard to who performed the contemplated Davis-Bacon work for defendant over the years. Plaintiff class has offered no affidavit and has failed to point to any material adduced during discovery which would controvert the affidavit of John Frazier.

On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this con-

tract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law. *See Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804, 808 (7th Cir. 1973).

The Davis-Bacon Act is essentially a minimum wage law which requires that "specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. . . ." 40 U. S. C. § 276a. The Act is designed to protect employees of persons contracting with the government from substandard earnings. *United States* v. *Binghamton Construction Co.*, 347 U. S. 171 (1954). The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18. 701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. *See Walsh* v. *Schlecht*, 97 S. Ct. 679, 686 (1977); *United States* v. *Binghamton Con-*

struction Co., 347 U. S. 171, 172 (1954); *McDaniel* v. *University of Chicago, supra; North Georgia Bldg & C. T. C.* v. *U. S. Dept. of Transportation*, 399 F. Supp. 58, 60-61 (N. D. Ga. 1975); 41 C. F. R. § 1-18.703-1 (1974).

After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties. *See Framlau Corporation* v. *Dembling*, 360 F. Supp. 806, 809 (E. D. Pa. 1973) and cases cited therein. This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed.

The court has examined the pendent counts raised in the complaint and due to the legally insubstantial nature of the federal claims raised in Counts I and II, the court, in the exercise of its discretion declines to assert jurisdiction over the claims raised therein. *See United Mine Workers of America* v. *Gibbs*, 383 U. S. 715 (1966); *Ohio Inns, Inc.* v. *Nye*, 542 F. 2d 673 (6th Cir. 1976), *cert. denied*, 45 U. S. L. W. 3651 (March 28, 1977); *McIlhenny* v. *American Title Ins. Co.*, 418 F. Supp. 364, 372 (E. D. Pa. 1976). Accordingly, this suit is dismissed in its entirety.

So ordered

/s/ George N. Leighton
George N. Leighton, United States District Judge

Dated: November 29, 1977

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1165

STANLEY E. COUTU, et al.,
Plaintiffs-Appellants,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 1129—George N. Leighton, *Judge.*

HEARD DECEMBER 6, 1978—DECIDED APRIL 4, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action was brought by plaintiff, an electronics technician,[1] and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U. S. C. § 276a *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and operate the Fermi National Accelerator Laboratory in Batavia,

1. Plaintiff was employed by defendant at the Fermi National Accelerator Laboratory from 1972 until he resigned three years later.

Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U. S. C. § 276a(a). We held in *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F. 2d 689 (7th Cir. 1977), certiorari denied, 434 U. S. 1033, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement.

Plaintiff and his class alleged in their "First Cause of Action" (hereinafter "Count I") that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages "required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act" (App. 2). Count I was dismissed in an unreported October 8, 1975, memorandum opinion and order of Judge McGarr. However, that order did not dismiss the remaining six Counties of the complaint.

On August 10, 1976, Judge Leighton, to whom the class action had been transferred, certified the plaintiff class.[2] Dis-

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2. The class was described as follows:

"All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT (49-8)-3000 between defendant and the United States of America 'for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been

(Footnote continued on next page.)

covery was apparently stayed in February 1977.[3] In March 1977, defendant filed a motion for summary judgment. In November 1977, Judge Leighton handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." In this memorandum order, the district court noted that no Davis-Bacon Act stipulations requiring the payment of prevailing wages were ever made a part of the contract between defendant and the United States.[4] The court noted that the plaintiffs class was relying on Article XXXIII of the contract providing that the contract did not contemplate the performance of work by defendant with its own employees "which the Commission [now the Energy Research and Development Administration (ERDA)[5]] determines is subject to the Davis-Bacon Act" and that such work was to be procured by subcontracts containing "the [Davis-Bacon] provisions relative to labor and wages required by law." The court then held that the contract failed to contain the "requisite Davis-Bacon Act specifications for maintenance of

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(Footnote continued from preceding page.)

paid wages less than 'the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*"

3. Plaintiff apparently relies on Judge Leighton's minute order of February 18, 1977, stating "P/T completed" to show discovery was thereby stayed. Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975.

4. In this respect, the court relied on an affidavit of John R. Frazier, chief legal counsel for the Fermi National Accelerator Laboratory. As will be seen, this affidavit does not resolve the controversy.

5. ERDA is the successor to the Atomic Energy Commission.

the claims stated in Count II" and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them "due to the legally insubstantial nature of the federal claims." Therefore, the complaint was dismissed in its entirety.

No notice of appeal was filed with respect to Judge McGarr's dismissal of Count I of the complaint, so that the principal question before us is whether Count II, asserting that defendant breached contractual obligations to the members of plaintiff class, was properly dismissed. At the outset, the parties disagree on what was decided by Judge McGarr and therefore what remained to be decided by Judge Leighton. The defendant insists that only two narrow fact questions were left open by Judge McGarr: (1) whether the contract actually contained Davis-Bacon Act stipulations and, if so, (2) whether Davis-Bacon Act work was performed by members of the plaintiff class. If this were all that was left for Judge Leighton to decide, the affidavit that there were no Davis-Bacon Act stipulations (n. 4 *supra*) might require affirmance of the summary judgment. However, we do not believe that Judge McGarr reduced the suit to a simple case of whether express wage stipulations in the contract had been breached. On the contrary, in dismissing Count I Judge McGarr held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover.[6] Clearly if a contract contains the required wage stipulations, this would

6. There is some support for the proposition that if work covered by the Davis-Bacon Act happens to be performed under a contract which did not intend that such work be performed by anyone, it is not covered by the Act. 40 Comp. Gen. 565 (1961). This interpretation, however, raises the additional question of who is to decide whether a contract is subject to the Act. Judge McGarr appeared to accept defendant's contention that authority to make this determination was accorded exclusively to the executive departments so that their decisions in this regard are not subject to judicial review (App. 23). We note in addition that even if such administrative action is reviewable, there may be an exhaustion requirement. We do not decide any of these questions, since they are not before us.

show that it was a Davis-Bacon Act contract. Judge McGarr apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

Thus two theories of recovery remained open to the plaintiff class after Judge McGarr's dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit (n. 4 *supra*) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

The key provision in the Contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> "This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work."

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by plaintiff and

his class. We agree that if the defendant actually performed such work with its own employees at the Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra.*

McDaniel involved a government contract clause which is virtually identical to Article XXXIII of this contract. The contract at issue in *McDaniel* was between the Atomic Energy Commission and the University of Chicago for operation of the Argonne National Laboratory. That contract barred the University of Chicago from construction work of a kind subject to the Davis-Bacon Act. As with Article XXXIII of the present contract, the University of Chicago was to have all Davis-Bacon Act work performed by subcontractors.[7] We held that the construction or alteration work performed by the University of Chicago was subject to the provisions of the Davis-Bacon Act even though the contract lacked a stipulation requiring the payment of Davis-Bacon Act wage rates, stating:

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7. The applicable clause of the *McDaniel* contract between the University of Chicago and the Atomic Energy Commission provided:

> "26.5 *Davis-Bacon and Other Labor Provisions for Construction Subcontracts.*
>
> "The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.
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> * * * * *
>
> "Supplement No. 16, Appendix D."
>
> (quoted at p. 1a of the Solicitor General's *amicus curiae* brief on petition for a writ of certiorari from the Supreme Court in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033.)

> "There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U.S.C. § 276a required the specifications to 'contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work' in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of mechanics and laborers by the contractor or subcontractor." (512 F. 2d at 584.)

Similarly here, the provisions of the Davis-Bacon Act must be read into Article XXXIII when, pursuant to a contract requiring Davis-Bacon Act work, the defendant performs "construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers." Section 1 of the Davis-Bacon Act applies to such work in government contracts in excess of $2,000 and mandates that an employer must pay "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the * * * subdivision of the State in which the work is to be performed * * *." 40 U. S. C. § 276a.

Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

McDaniel was not an isolated instance of reading applicable statutory requirements into government contracts. We were

merely following precedents established as early as 1827 and applied consistently thereafter.[8] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act "stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in" the contract (see n. 4 *supra*) is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff to tender a counter-affidavit.

It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed.[9] Therefore the district court was mistaken

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8. See, *e.g., Ogden* v. *Saunders,* 25 U. S. (12 Wheat.) 212 (1827); *Woods* v. *Lovett,* 313 U. S. 362, 370; *G. L. Christian & Associates* v. *United States,* 312 F. 2d 418, 320 F. 2d 345 (Ct. Cl. 1963), certiorari denied, 375 U. S. 954; *United States* v. *New Orleans Public Service Inc.,* 553 F. 2d 459, 469 (5th Cir. 1977); *Campagnie Générale Transatlantique* v. *American Tobacco Co.,* 31 F. 2d 663, 666 (2d Cir. 1929); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794, 800 (E. D. Tenn. 1962); 3 Corbin on Contracts, § 551; 4 Williston on Contracts, § 615 at p. 621; Dees and Ginsberg, *Contract Interpretations and Defective Specifications* (Government Contracts Monograph No. 4, 1975 ed., George Washington University) 1-4.

United States v. *Joseph A. Holpuch Co.,* 328 U. S. 234, on which defendant relies, is not to the contrary. It did not concern the question whether applicable statutory terms must be read into government contracts. *International Association of Machinists* v. *Hodgson,* 515 F. 2d 373 (D. C. Cir. 1975), cited by defendant at oral argument, is also consistent with our holding. That case involved the Secretary of Labor's decision to exercise his discretion not to issue a wage determination under the Service Contract Act. The Davis-Bacon Act, however, confers no such discretion on him.

9. See 43 F. R. 11379-11383 containing the introductory notice to a recent compilation of the Secretary's wage determinations and decisions specifically applicable to government project work in Kane County. 42 F. R. 30108-30111, 35522, 39847-39848 contain examples of such decisions.

in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

Exhaustion of Administrative Remedies Is Not Required

If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situation, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor.[10] In the *McDaniel* cases, there was no showing that the plaintiff and his class had attempted to secure administrative relief, and in according them a judicial remedy we necessarily decided that there was no requirement that they first seek redress from the contractor or the Department of Labor. Moreover, the administrative procedures seem to be aimed at contractor compliance with the Davis-Bacon Act. Defendant has not shown that the Secretary of Labor has any authority to order a contractor to pay more for Davis-Bacon work already completed.[11] As the Government itself recognized in *McDaniel II*,

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10. See p. 12 of supplemental brief for defendants-appellees in *McDaniel* v. *University of Chicago*, 548 F. 2d 689 (7th Cir. 1976), certiorari denied, 434 U. S. 1033.

11. Enforcement through contract termination and debarment from future contracts is provided for. 40 U. S. C. § 276a-1; 29 C. F. R. § 5.7(d); 29 C. F. R. § 5.6(b)(1). Additionally, the regulations provide for suspension of payments under the contract if the agency (here ERDA) determines the contractor has failed to "comply with labor standards stipulations * * *" (29 C. F. R. § 5.9). This remedy seems inadequate to assure the employees of a full recovery in the present case for three reasons: (1) it is based on the assumption that there are stipulations in the contract, (2) it provides for withholding payment only until the violations are discontinued or (apparently in the agency's discretion) enough has been withheld to compensate the employees, and (3) withholding funds is hardly

(Footnote continued on next page.)

> "Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract." (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033, at 25, n. 20.)

Instead, the regulations are either inadequate as to this class or are merely detailed guidelines for determining what constitutes Davis-Bacon work.[12] While such regulations presumably facilitate contractor compliance, they do not assure a remedy to employees.[13]

The cases cited by defendant for the proposition that the administrative remedies are adequate involved contracts which did contain Davis-Bacon Act stipulations. The disputes in those cases focused on the proper classification of work[14] or the

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(Footnote continued from preceding page.)
feasible in this case since, as counsel for defendant advised us at oral argument, the defendant is merely a conduit for federal funds. It is thus not clear that such a contractor can or should be required to make restitution out of its own unrelated funds.

Finally, the regulations provide that "[t]he Agency Head may, in appropriate cases * * * request that restitution be made * * *." (29 C. F. R. § 5.10.) Apart from the fact that the precatory language of this regulation gives employees no sure means of redress, this would not seem to be an "appropriate case" for such restitution in view of the defendant's self-styled conduit nature.

12. See n. 11 *supra* and 41 C. F. R. §§ 9-18.701, 9-18.704, 9-18.740.

13. The Disputes clause contained in Article XIX of the contract with respect to the resolution of controversies between the contracting parties is inapplicable because it relates only to questions of fact whereas the question before us is essentially one of law, *vis.,* whether the provisions of the Davis-Bacon Act apply to construction, alteration or repair work performed by defendant's employees, and because this is not a controversy between the contracting parties.

14. *North Georgia Building & Construction Trades Council* v. *Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1975); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *In re Stanford Linear Accelerator Center,* 16 Wage-Hour Cases 851 (Wage Appeals Board, Department of Labor 1965).

determination of wage rates.[15] These and other cases involving the finality of the Secretary of Labor's decisions regarding wage rates and job classifications are not germane to the central question in this case, which is whether the required wage rate stipulations are incorporated into the contract as a matter of law. That is not a question on which deference to agency expertise is appropriate.

In addition, defendant's reliance on Section 4 of the Act (40 U. S. C. § 276a-3)[16] is misplaced since defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates. While 41 C. F. R. § 9-15.5006(i) recommends that wages as well as other costs be set out in ERDA contracts, this does not authorize ERDA to establish non Davis-Bacon Act rates in contracts to which that Act applies. Even if this were the intent of the regulation, since it is not authorized by law it could not qualify as an exception under Section 4 of the Act.[17]

Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant

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15. *International Union of Operating Engineers* v. *Arthurs,* 355 F. Supp. 7 (W. D. Okla. 1973), affirmed, 480 F. 2d 603 (10th Cir. 1973).

16. Section 4 of the Act provides:

> *"Effect on other Federal laws*
>
> "Sections 276a to 276a-5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."

17. There is other evidence that ERDA is not authorized to set wage rates that do not comply with the Davis-Bacon Act. Executive Order 10789, pursuant to 50 U. S. C. § 1431, authorizes the Secretary of the Atomic Energy Commission (predecessor to ERDA) to enter into contracts containing certain limitations. Paragraph 13 of that Order specifically states that nothing in the Order shall be construed to allow the Secretary to set aside the requirements of the Davis-Bacon Act. If he already had that power by federal law, this provision in the Executive Order would be both superfluous and unavailing.

used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII.

The judgment dismissing the complaint is reversed and the cause is remanded for further consideration consistent with this opinion.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,

Petitioner,

vs.

STANLEY E. COUTU,

Respondent.

Facts and Opinion 595 F. 2d 396

Ordered that: The Petition for Writ of Certiorari is granted.

DAVIS-BACON ACT

§ 276a. Rate of Wages for Laborers and Mechanics

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to

laborers and mechanics employed by the contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a

to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under section 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

§ 276a—1. Termination of Work on Failure to Pay Agreed Wages; Completion of Work by Government

Every contract within the scope of sections 276a to 276a—5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written

notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government of any excess costs occasioned the Government thereby.

§ 276a—2. PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages of voluntarily made refunds.

§ 276a—3. EFFECT ON OTHER FEDERAL LAWS

Sections 276a to 276a—5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

§ 276a—4. EFFECTIVE DATE OF SECTIONS 276a to 276a—5

days after August 30, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935.

§ 276a—5. SUSPENSION OF SECTIONS 276a TO 276a—5 DURING EMERGENCY

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a—5 of this title.

§ 276a—6. APPROPRIATION

§ 276a—7. APPLICATION OF SECTIONS 276a TO 276a—5 TO CONTRACTS ENTERED INTO WITHOUT REGARD TO SECTION 5 OF TITLE 41

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a—5 of this title, if such Act would otherwise be applicable to such contract.

§276c. REGULATIONS GOVERNING CONTRACTORS AND SUBCONTRACTORS

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction,

prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

PROVISIONS OF GOVERNMENT CONTRACT AT (49-8)-3000

This Supplemental Agreement (hereinafter referred to as "this contract"), is entered into the 6th day of April 1972, effective as of July 1, 1971, between the United States of America (hereinafter referred to as the "Government"), acting through the U. S. Atomic Energy Commission (hereinafter referred to as the "Commission"), and Universities Research Association, Inc. (hereinafter referred to as the "Association" or "Contractor"), a corporation organized and existing pursuant to the District of Columbia Non-Profit Corporation Act.

* * * * *

This contract is authorized by and has been negotiated and entered into under Section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended.

* * * * *

ARTICLE VI—ALLOWABLE COSTS

1. Payment for the allowable cost as hereinafter defined, plus the allowance provided for in paragraph 5 of this article, shall constitute full and complete compensation for the performance of the work under this contract.

2. The allowable costs of performing the work under this contract shall be the costs and expenses that are actually incurred by the Association in performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph 2. The determination of the allowability of cost hereunder shall be based on:

* * * * *

g. Personnel costs and related expenses incurred in accordance with Appendix B, or amendments thereto, such as:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday and other

premium pay for time worked; nonwork time including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees: Provided, however, that the Contracting Officer's approval is required in each instance of direct compensation to an individual employee at an annual rate in excess of $20,000, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under AEC cost-type contracts. Direct compensation, as used here, includes only the employee's base salary and bonus and incentive compensation payments.

* * * * *

Appendix B may be modified from time to time, in writing, without execution of an amendment to this contract for the purposes of effecting any changes in or additions to Appendix B as may be agreed upon by the parties.

* * * * *

ARTICLE XXXIII—LABOR PROVISIONS

1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

* * * * *

Contract No. AT (49-8)-3000

APPENDIX B

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APPENDIX B

I. Allowability of Personnel Costs and Related Expenses

Allowability of personnel costs and related expenses shall be in accordance with the provisions of this appendix, unless individual exceptions are granted by the Laboratory Director or the President of URA and are approved by the Contracting Officer.

* * * * *

III. Wages and Salaries

A. Salary and Wage Schedules

1. The wage and salary schedules in effect at the Laboratory are included in Section XIX.
2. The Laboratory will establish a pattern of wage and salary review, and not less often than once each year will provide the Commission with data sufficient for the proper review and prior approval of overall merit wage and salary adjustments proposed for all employees, excluding organized employees. In addition, the Laboratory will provide the Commission with such current wage and salary data as may from time to time be required in connection with the Laboratory's wage and salary program.
3. Except as may be approved by the Contracting Officer, salary increases to present employees will not exceed the employee's prior rate of pay by more than fifteen percent (15%), except in the case of promotion to a higher classification, where the new minimum rate for that classification may be paid.

* * * * *

Revision No. 34 Contract AT(49-8)-3000

March 1, 1975 Appendix B

FERMI NATIONAL ACCELERATOR LABORATORY

Weekly Job Titles and Grades

Titles	Grades
Clerk I	W-1
Drafting Asst	1
Fire Fighter	1
Fire Fighter Trainee	1
Fire Lieutenant	1
Food Service Helper	1
Keypunch Operator I	1
Laboratory Asst	1
Operating Asst/Accelerator	1
Scanner Trainee	1
Stenographer	1
Assembler, Bench or Floor	W-2
Clerk II	2
Keypunch Operator II	2
Scanner I	2
Secretary I	2
Telephone Operator I	2
Detail Draftsman	W-3
Food Service Attendant	3
Food Service Laborer	3
Janitorial Worker I	3
Laboratory Technician	3
Maintenance Worker I	3
Model Maker Jr.	3
Operating Tech/Accelerator	3
Scanner II	3
Shop Helper	3
Telephone Operator II	3
Carpenter II	W-4
Chief Telephone Operator	4
Clerk III	4
Computer Operator I	4
Food & Beverage Handler	4
Keypunch Operator III	4
Mail Clerk	4
Secretary II	4
Accelerator Operator I	W-5
Draftsman	5
Groundskeeper	5
Janitorial Worker II	5
Ld Shop Helper	5
Mail Carrier	5
Maint. Electrician II	5
Maint. Mechanic II— HVAC	5
Maint. Worker II	5
Programmer Trainee	5
Rigger	5
Scanner III	5
Technician I	5
Bartender	W-6
Clerk Sr.	6
Construction Inspector I	6
Cook	6
Food Service Supr.	6
Janitorial Group Ldr	6
Lead Keypunch Operator	6
Photographer	6
Secretary III	6
Maintenance Group Ldr	6

Titles	Grades
Carpenter III	W-7
Computer Operator II	7
Expediter	7
Locksmith	7
Maint. Electrician III	7
Maint. Mechanic III—HVAC	7
Model Maker	7
Nurse	7
Painter	7
Sr. Draftsman	7
Sr. Groundskeeper	7
Sr. Mail Carrier	7
Sr. Scanner	7
Technician II	7

Titles	Grades
Accelerator Operator II	W-8
Asst Programmer	8
Carpentry Grp Ldr	8
Construction Inspector II	8
Lead Groundskeeper	8
Maint. Electrician IV	8
Maint. Mechanic IV—HVAC	8
Sr. Photographer	8
Computer Operator III	W-9
Design Draftsman	9
Electrician Group Leader	9
HVAC Group Leader	9
Model Maker Sr.	9
Nurse Sr.	9
Sr. Technical Aide	9
Sr. Accelerator Operator	W-10
Sr. Design Draftsman	10

Revision No. 35
April 1, 1975

Contract AT(49-8)-3000
Appendix B

FERMI NATIONAL ACCELERATOR LABORATORY

Weekly Pay Ranges

Grade	Minimum	Midpoint	Maximum
W- 1	$118	$136	$154
2	130	149	169
3	144	165	186
4	158	182	206
5	174	200	226
6	191	220	249
7	211	242	273
8	231	266	301
9	255	293	331
10	279	321	363

Revision No. 34

November 1, 1974

SCHEDULE OF WAGES* (EFF. 11/1/74)

1. Basic Hourly Rates:**

	Effective 11/1/74		
	Start	6 Months	One Year
Occupational Group 1			
Working Foreman	7.61	7.76	7.81
Instrument Maker	6.91	7.31	7.41
Instrument Machinist	6.61	7.11	7.21
Occupational Group 2			
Working Foreman	7.61	7.76	7.81
Repair Machinist	6.61	7.11	7.21
Occupational Group 3			
Working Foreman	7.61	7.76	7.81
Lead Instrument Welder	6.91	7.31	7.41
Instrument Welder	6.61	7.11	7.21
Occupational Group 4			
Machine Repair Mechanic	5.07	5.32	5.57
Lead Machine Shop Ass't	4.82	5.07	5.32
Machine Shop Ass't	4.57	4.82	5.07
Occupational Group 5			
Production Welder	4.82	5.07	—

2. Longevity:
   a. Two years' service in bargaining unit—5¢ above basic rate
   b. Three years' service in bargaining unit—10¢ above basic rate

* This is a schedule of minimum rates; the Laboratory may pay at rates above those listed to employees whose work performance, as evaluated by the Laboratory, merits such treatment.

** Employees who are promoted to a higher classification shall be paid at the equivalent bargaining unit seniority rate in the higher classification as they previously occupied in the lower classification.

UNITED STATES ATOMIC ENERGY COMMISSION
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

January 23, 1968

Dr. Norman F. Ramsey, President
Universities Research Association, Inc.
2100 Pennsylvania Avenue, N. W.
Washington, D. C. 20037

Dear Dr. Ramsey:

Contract No. AT(49-8)-3000 for the 200 BEV Accelerator does not contemplate the performance of Davis-Bacon Act work by the Association with its employees, and provides that any work determined by AEC to be subject to that Act will be performed under subcontracts containing the provisions relative to labor and wages required by law to be included in contracts for the construction of a public building or work. This provision with respect to the Davis-Bacon Act has been discussed between representatives of AEC and the Association, and has been included with the following understandings:

(a) If presently unforeseen conditions arise which make it necessary in the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

(b) Should the Laboratory Director desire a review of any determinations with respect to the applicability of the Davis-Bacon Act, written requests for such reviews may be submitted to the AEC General Manager for consideration and resolution.

Sincerely yours,
/s/ Kenneth A. Dunbar
Kenneth A. Dunbar
Manager

UNITED STATES ATOMIC ENERGY COMMISSION
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

April 6, 1972

Dr. Norman F. Ramsey, President
Universities Research Association, Inc.
2100 Pennsylvania Avenue, N. W.
Washington, D. C. 20037

Dear Dr. Ramsey:

Modification No. 14 to Contract No. AT(49-8)-3000 for the 200 BEV Accelerator does not contemplate the performance of Davis-Bacon Act work by the Association with its employees, and provides that any work determined by AEC to be subject to that Act will be performed under subcontracts containing the provisions relative to labor and wages required by law to be included in contracts for the construction of a public building or work. This provision with respect to the Davis-Bacon Act has been discussed between representatives of AEC and the Association, and has been included with the following understandings:

(a) If presently unforeseen conditions arise which make it necessary to the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

(b) Should the Laboratory Director desire a review of any determinations with respect to the applicability of the Davis-Bacon Act, written requests for such reviews may be submitted to the AEC General Manager for consideration and resolution.

Sincerely yours,
/s/ Kenneth A. Dunbar
Kenneth A. Dunbar
Manager

AMENDED FIRST REQUEST TO PRODUCE.

Defendant, Universities Research Association, Inc., is hereby requested, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to produce the items described hereafter for inspection and copying by plaintiff's attorneys at the offices of Arnold and Kadjan, 11 South LaSalle Street, Chicago, Illinois within thirty days after service hereof or within such shorter date as may be fixed by the court herein.

I. DEFINITIONS AND CONSTRUCTION.

A. As used herein, the words and phrases set out below shall have the meaning or meanings prescribed for them:

1. "Document or documents" shall mean every original (and every copy of any original or copy which differs in any way from any original) of every writing or recording of every kind or description, whether handwritten, typed, drawn, sketched, printed, or recorded by any physical, mechanical, electronic or electrical means whatever, including without limitation books, records, papers, pamphlets, brochures, circulars, advertisements, specifications, blueprints, maps, plats, surveys, drawings, sketches, graphs, charts, plans, tests, laboratory or engineering reports, measurements, models, correspondence, communications, telegrams, memoranda, notes, notebooks, worksheets, reports, lists, analyses, summaries, ledgers, books of original entry, journals, accounts, audits, inventories, tax returns, Federal Forms WH347, unemployment compensation forms, financial statements, profit and loss statements, cash flow statements, balance sheets, annual or other periodic reports, budgets, prospectuses, registrations, solicitations, minutes, stock ledgers, stock certificates, certificates of deposit, time account passbooks, securities, licenses, permits, calendars, appointment books, diaries, telephone bills and toll call records, expense reports, commission statements, itineraries, agendas, wage and payroll records, employment and personnel records, checkbooks, check

stubs, bank statements, cancelled checks, receipts, cash disbursement ledgers, contracts, agreements, instruments, assignments, applications, authorizations, offers, acceptances, bids, proposals, financing statements, documents of title, appraisals, purchase orders, invoices, bills or statement of account, bills of lading, written memorials of oral communications, forecasts, photographs, photographic slides or negatives, films, filmstrips, tapes, and recordings.

2. "Related" or "relating to" shall mean directly or indirectly mentioning or describing, pertaining to, being connected with, or reflecting upon a stated subject matter.

e. "Identification" or "identify" as applied to documents shall mean stating the date, author, addressee, signatory, number of pages, subject matter (which shall be stated with particularity) and giving the name and address of the custodian thereof and the location of the document.

4. "Relied upon" shall mean being or having been depended upon or referred to or being or having been arguably appropriate for such reliance.

5. "Defendant" shall mean the defendant in this lawsuit and its predecessors and successors, if any, and, when not negated by the context, shall also mean each and every officer, employee, attorney or agent of each and every such entity who presently holds such a position or has held such a position at any time during the period covered by this request.

6. "Person" shall mean each and every individual, corporation, partnership, joint venture, social or political organization or any other entity, whether real or juridical or incorporated or unincorporated, encompassed within the usual and customary meaning of "person" or otherwise encompassed within this definition.

7. "Technician" shall mean any person who is or has been employed by defendant at the Fermi National Accelerator Laboratory site at any time during the relevant period who was

assigned the title or performed the work of a Technician I, Technician II, Senior Technician, Technician (or "Tech") Specialist, Laboratory (or "Lab") Assistant, Laboratory (or "Lab") Technician (or "Tech") or Operator.

B. In construing this request:

1. The singular shall include the plural and the plural shall include the singular.

2. A masculine, feminine or neuter pronoun shall not exclude the other genders.

3. If a request for production is silent as to the time span for which production is desired, production shall be made of all documents requested from January 1, 1970 to the date of production.

4. Each request shall extend to all documents which are or have been in the possession or subject to the control of the defendant, its officers, agents, attorneys or employees at any time during the period of time covered by this request.

5. The requests to produce contained herein shall be deemed to be continuing in nature and shall include documents described herein which are discovered after any initial production of documents in compliance herewith, which later-discovered documents shall be produced in accordance with this Request to Pro duce within thirty days after their discovery.

II. CLAIMS OF PRIVILEGE.

All documents as to which any privilege is claimed shall be produced, marked, identified, held separately, and retained intact by the defendant subject to and pending a ruling by the court as to the claimed privilege.

III. PRODUCTION REQUESTS.

The following are to be produced at the time and place described above:

1. Each and every document related to the number, identity number, present or last known address, hiring, advancement,

termination, tenure and conditions of employment, union membership, compensation (including fringe benefits), nature of work performed, quality of work performed, job description and job title of the following:

a. All persons employed or sought to be employed by defendant as Technicians or any functional equivalent thereof; and

b. All persons employed by defendant who performed any labor in connection with construction, alteration and/or repair, including painting and decorating, of any public buildings or public works of the United States.

2. Each and every document related to communications between defendant and any other person which related to the application or non-application of the Davis-Bacon Act to any undertaking of defendant or of any of its employees.

3. Each and every document, including without limitation the following categories of documents, which is related to any of the persons described in Request Number 1 or their work:

a. Job (or personnel) requisitions;

b. Notes or memoranda related to hiring or requests for hiring;

c. Job offers extended;

d. Resumes and applications received;

e. Contractual change requests;

f. Crew chief logs;

g. Payroll records;

h. Equipment failure reports;

i. Personnel records;

j. "Village Crier" issues;

k. Monthly summaries of manpower (sometimes called "monthly personnel reports");

l. Job descriptions;

m. Payroll authorizations;

n. The "personnel policy guide", (including superseded pages or issues);

o. "Procedures for experimenters" (including superseded pages or issues);

p. The Ledger of job requisitions;

q. The "Control list of employees";

r. Reviews or surveys of labor markets, salaries, area scales or wage determinations of any kind;

s. Minutes or notes relating to administrative meetings.

4. Each and every document related to correspondence between defendant and any other person relating to: any of the persons described in Request No. 1 or their jobs or similar positions (whether or not actually created or filled); the application of the Davis-Bacon Act to any transaction or event; or the subject matter of this lawsuit.

5. Each and every document setting out the organization and structure of the defendant's operations at Fermi National Accelerator Laboratory.

6. Each and every statement obtained from any person who may be called as a witness by defendant herein.

MOTION TO SHORTEN TIME FOR PRODUCTION.

Plaintiffs move the Court pursuant to Rule 34(b) of the Federal Rules of Civil Procedure to shorten the time within which defendant must comply with their attached Amended First Request to Produce to fifteen days after service thereof.

In support of this motion, plaintiffs state as follows:

1. The documents requested must be examined so that further discovery may proceed.

2. The Court has several times stated its desire that discovery be expedited herein.

3. The hastening of the requested production will facilitate the completion of discovery.

Wherefore, plaintiffs pray the Court to order defendant to comply with plaintiffs' Amended First Request to Produce within fifteen days after service thereof.

ANSWER TO PLAINTIFF'S MOTION FOR A SHORTENED TIME FOR PRODUCTION OF DOCUMENTS;

MOTION FOR STAY OF PRODUCTION PENDING RESOLUTION OF LEGAL ISSUES; ALTERNATE MOTION FOR PROTECTIVE ORDER.

Defendant hereby answers Plaintiff's Motion as follows:

A. DEFENDANT CANNOT PRODUCE ALL OF THE DOCUMENTS REQUESTED WITHIN THE TIME SOUGHT.

Plaintiff requests all documents relating to "all persons employed or sought to be employed by Defendant as Technicians or any functional equivalent thereof," and other vaguely described persons. Request, ¶'s I, III 1.a.b., 3, 4. Plaintiff lists well over one hundred twenty (120) species of documents as being included in the Request. Request, ¶'s I A.1., III 3.

Many species cover thousands of individual documents: *e.g.*, crew chief logs, equipment failure reports and cancelled checks which reflect daily occurrences (*cf.* Orr deposition, pp. 59-61).

Defendant employs more than four hundred (400) technicians (Marofske deposition, p. 12). Adding persons who have since terminated their employment, the total number is well over five hundred (500) (*cf.* Marofske deposition, p. 28). Depending on how broadly one construes the vague reference "or functional equivalent thereof," many more persons could be covered (*cf.* Huson deposition, pp. 1-13).

Defendant, therefore, is being requested to produce literally tens of thousands of documents.

Gathering such material obviously would require thousands of man-hours. To compress such time within the bounds of the normal time allowed for production—and, *a fortiori*, within the time now sought by the Plaintiff—would thoroughly disrupt operations and would indeed be altogether impossible.

In addition, enormous costs would be incurred for personnel, duplication and transportation expenses.

Accordingly, Defendant urges the Court to deny Plaintiff's Motion for expedited production of documents because of patent absurdity and because of sheer impossibility.

B. DEFENDANTS' REQUEST SHOULD BE STAYED.

The great bulk of documents covered in Plaintiff's Request relate to "Technicians." However, "Technicians" are not included in the class certified by the Court's Order of August 4, 1976. That Order limited the class to:

> "All '*mechanics and/or laborers*' employed by defendant pursuant to Contract No. AT(49-8)-3000 . . . as stated and defined in the Davis-Bacon Act, 40 U. S. C. 276a, *et seq.*" (Emphasis added.)

Accordingly, Plaintiff's request for documents rests on a bald presumption that "mechanics and/or laborers" and "Technicians" are synonymous. That presumption is patently inaccurate.

Authority to resolve questions concerning application of the Davis-Bacon Act to various classes of employees and work is vested exclusively in the contracting agencies with appeal to the Secretary of Labor and U. S. Department of Labor Wage Appeals Board. *Gillioz* v. *Webb*, 99 F. 2d 585, 586-587 (5th Cir. 1938), *cited with approval, United States* v. *Binghamton Const. Co., Inc.*, 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954). *See also Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127-129, 60 S. Ct. 869, 876-877 (1940). *And see* Judge McGarr's earlier ruling in this case:

> "The defendant . . . has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and

> Appeals Board of the U. S. Department of Labor. 29 C. F. R. 5.11; 41 C. F. R. 7.10. . . ."
>
> *Coutu* v. *Universities Research Association, Inc.*, 75 C 1129 (N. D. Ill. 1975) at p. 5.

By virtue of authoritative regulations at 41 C. F. R. §§ 9-18.700 through 9-78.750, scientific research and experimentation generally are excluded from Davis-Bacon Act coverage. The regulations are approved by the Secretary of Labor. 41 C. F. R. § 9-18.702-50.

In a case involving assembly of accelerator modules used in conducting high energy physics research, the Wage Appeals Board has ruled such work not covered by the Davis-Bacon Act. *In re Stanford Linear Accelerator Center*, WAB Case No. 65-2, 16 WH 851 (BNA, 1965).

Federal Procurement Regulations, moreover, clearly provide that the term "mechanics and laborers," as used in the Davis-Bacon Act:

> "does not apply to . . . office workers, superintendents, *technical engineers or scientific workers*. . . ."
>
> 41 C. F. R. § 1-18.701-1(b)(1) (Emphasis added).

The contract sued upon here—a contract between the United States and Defendant—expressly sets forth wage schedules for "technicians," in various grades. Contract No. AT(49-8)-3000 at Appendix B;* Marofske deposition at pp. 17-18, 28-30. The contract further provides that it does not contemplate that such employees will perform work which the Government determines to be governed by the Davis-Bacon Act. Contract, p. 54.

Government agents employed to enforce Davis-Bacon Act requirements have closely monitored Defendant's operations to ensure compliance (Orr Deposition, pp. 82-83). Testimony

* The Court previously has been supplied a copy of the contract. *See* Order dated October 5, 1975 at p. 4.

given by four (4) physicists who are members of Defendant's administration shows that Defendant employs technicians to assemble, operate and maintain scientific equipment used to assist scientists carry out experiments and research in the field of high energy physics; they testified that technicians perform no work falling outside the sphere of scientific work. Deposition of Dr. Orr, pp. 27-36, 42-44, 52-54, 62-64, 75-76; Deposition of Dr. Peoples, pp. 17-31, 45-49; Deposition of Dr. Huson, pp. 19-25, 29-35, 41-46; Deposition of Dr. Carrigan, pp. 33-40, 57-59.

No appeal has been made to the Labor Department Secretary or Board in connection with the classification of Defendant's technicians or the work they perform.

In short, this Court has confined the action to mechanics and laborers, as defined by the Davis-Bacon Act. Technicians are not in that category, as determined by the Contracting Agency, and regulations. No appeal has been taken to the Department of Labor, which is the sole forum to resolve issues of coverage. Material regarding technicians, therefore, cannot be pertinent to this action.

In addition, no technician employed by Defendant, except the named Plaintiff—has filed a written consent to become a party plaintiff as required by 29 U. S. C. § 256:

> "[I]n the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—
>
> > "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > "(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced."

By virtue of that statute, technicians cannot be deemed parties to the action. *Compare, Kulik* v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (N. D. Ill. 1962) at Conclusion of Law No. 5, p. 941.

Since technicians are not covered by the class certification, have not been determined by the Secretary of Labor to be "mechanics or laborers," and have not—with one exception only—entered the action, and in view of the enormous expense, and dislocation which Defendant would suffer if required to honor Plaintiff's request, it is submitted, respectfully, that the Court should order a stay pending resolution of the question whether "technicians" are or are not involved in the action.

C. ALTERNATIVE MOTION FOR PROTECTIVE ORDER.

Contingent on the Court's action on the points raised above, Defendant alternately moves the Court for a protective order pursuant to Rule 26(c), as follows:

(a) that Defendant be relieved of any obligation to produce documents respecting any "technician" for the reasons set forth above;

(b) that Defendant be relieved of any obligation to produce routine payroll records, cancelled checks, personnel files, or, without limit, any documents relating to employee hiring, hours worked, wages, terms and conditions of employment, termination, and evaluation for the reason that Defendant is prepared to enter into appropriate stipulations concerning such matters, to the extent they are deemed by the Court relevant;

(c) that Defendant be relieved of any obligation to produce documents relating to any person, however classified, who has not filed a consent, and respecting any matter arising more than two (2) years prior to

any filing of such person's consent in the future as required by 29 U. S. C. § 256, for the reasons set forth in that statute and explained by the Court in *Kulik* v. *Superior Pipe Specialties, supra*;

(d) that Defendant be relieved of any obligation to produce documents as described in Request, Item No.'s III 2. and 4., for the reasons that such Request Items are patently vague, uncertain, indefinite, and would require Defendant to make assumptions. Defendant is willing to produce "Requests for Davis-Bacon Determination" filed by it with the Government, covering work performed within the limitation period specified in 29 U. S. C. § 255. *See* Kennedy deposition, Plaintiff Exhibit 1;

(e) that Defendant be relieved of any obligation to produce documents as described in Request Item No.'s III 2., 4. and 6. for the reasons set forth in Federal Rule 26(b)(3);

(f) that Defendant be relieved of any obligation to produce other than official documents made and filed in the normal course of Defendant's operations or documents specifically identified as to date, location and person by Plaintiff for the reason that the Request is otherwise too vague, and would cause Defendant undue burden and expense;

(g) that Defendant be relieved of any obligation to produce more than one of the documents described in Request Item No. III as defined in Part I of the Request, for the reason that the Request is otherwise unduly burdensome and expensive;

(h) that Plaintiff be directed to advance costs in excess of two hundred dollars ($200.00) reasonably anticipated to be incurred by Defendant in honoring the Request, or post a bond for their payment, should

Defendant ultimately prevail for the reason that Defendant should not be expected to advance enormous costs unsecured, in light of the dubious legal merit to Plaintiff's claim;

(i) that Defendant be permitted to construe all requests as being limited generally by the provisions of the Davis-Bacon Act and Regulations promulgated thereunder, for the reason that otherwise the Request particularly that part set forth in Item III 1.b otherwise is too vague and indefinite; and

(j) that Defendant not be required to produce any document owned by the United States, or any other entity, or person, other than Defendant.

ORDER ENTERED DECEMBER 21, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 75 C 1129 Date December 21, 1976

Title of Cause Stanley E. Coutu, vs. Universities Research Association, Inc., a corporation

Brief Statement of Motion: Motion to Shorten Time for Production

Names and Addresses of moving counsel: Arnold and Kadjan 11 South LaSalle Street; Chicago, Illinois 60603 Representing Plaintiffs

Names and Addresses of other counsel entitled to notice and names of parties they represent.: Robert E. Mann, Esq. Seyfarth, Shaw, Fairweather & Geraldson 55 East Monroe Street Chicago, Illinois 60603

Defendant

DOCKETED

Leighton. J.

December 27, 1976

Notes: The defendants shall file their Answer to the Motion to shorten time for production on or before January 3, 1977. The reply thereto shall be filed on or before January 17, 1977. The Court will rule on said Motion on February 18, 1977, and cause is not set for a pre-trial conference on said February 18, 1977 at 9:00 A. M.

ORDER ENTERED FEBRUARY 18, 1977

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 75 C 1129 Date 2-18-77

Title of Cause Stanley E. Coutu v. Universities Research Association, Inc.

Brief Statement of Motion: Pretrial Conference

DOCKETED

LEIGHTON, J.

February 23, 1977

NOTES: P/T completed. Defendant to file motion for summary judgment on or before 3-18-77; Plaintiff to answer on or before 3-28-77; defendant to reply by 4-4-77; court to rule on 5-4-77. Status report of 3-4-77 vacated and reset for 5-13-77 at 2:00 P. M.

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court to enter judgment for Defendant, on the ground that no material issue of fact exists and Defendant is entitled to judgment as a matter of law. In support, Defendant states:

(1) This action was brought to enforce an alleged contract based upon provisions of the Davis Bacon Act, 40 U. S. C. 276(a), pursuant to which Plaintiff allegedly performed work.

(2) The only material issue is whether or not Defendant has entered into such a contract.

(3) The only contract cited in the pleadings or referred to in discovery is Contract No. AT(49-8)-3000, as amended, (now designated EY-76-C-02-3000) between Defendant and United States of America.

(4) This Court previously has ruled that Contract No. AT(49-8)-3000 will not support a contract action based upon the Davis-Bacon Act. *See* Memorandum Opinion and Order dated October 8, 1975 issued by Judge McGarr. The Court allowed the action to proceed thereafter solely to permit Plaintiff an opportunity to show, if he could, the existence of a contract incorporating Davis-Bacon Act stipulations.

(5) Plaintiff's counsel admitted at the pre-trial conference held February 18, 1977 that it cannot prove the existence of of any contract between the United States and Defendant, incorporating Davis-Bacon Act stipulations.

(6) There is in fact no contract between the United States and Defendant other than Contract No. AT(49-8)-3000. *See*: Affidavit of John R. Fraizer, Chief Legal Counsel of Fermi National Accelerator Laboratory, attached.

(7) As a matter of law, Defendant cannot be held liable on a contract which does not exist.

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* The Court previously has been supplied a copy of Contract No. AT(49-8)-3000.

(8) The Court is without jurisdiction to fashion a contract for the parties.

A memorandum of points and authorities in support of this Motion is filed herewith.

Wherefore, Defendant prays that it be granted a Summary Judgment.

AFFIDAVIT OF JOHN R. FRAZIER IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JOHN R. FRAZIER, the undersigned, being first duly sworn upon his oath, deposes and states that if called to testify in this matter based on personal knowledge, he would state as follows:

1. Affiant is and at all pertinent times to the Complaint herein has been, Chief Legal Counsel for the Fermi National Accelerator Laboratory ("Fermilab"). Pursuant to his duties as Chief Legal Counsel, Affiant is and would be familiar with all contracts and their terms and provisions, Defendant has with the United States or any government agency acting on its behalf.

2. Contract No. EY-76-C-02-3000, as amended (formerly designated as AT(49-8)-3000), is the only contract Defendant has or ever had with the United States or any government agency acting on its behalf.

3. No Davis-Bacon Act, 49 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract No. EY-76-C-02-3000.

4. Further the Affiant sayeth not.

/s/ John R. Frazier
John R. Frazier

Subscribed and Sworn to before me this 16th day of March, 1977.

/s/ Joyce E. Sobinsky
Notary Public